

# What are your legal obligations if you want to terminate an employee's employment?

## Legal information for community organisations

### This fact sheet covers:

- ▶ things to consider before terminating employment
- ▶ unlawful termination
- ▶ unfair dismissal
- ▶ general protections
- ▶ redundancy
- ▶ notice requirements
- ▶ final pay
- ▶ what happens if an employee objects to termination of their employment, and
- ▶ exit procedures

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**Terminating an employee's employment ('termination') is also called 'dismissing' or 'sacking' an employee. Termination can be stressful for the people concerned and involves a number of legal requirements.**

If you are thinking about terminating the employment of an employee, your organisation should consider its legal obligations carefully. Your legal obligations may vary depending on the type of employee whose employment is being terminated.



### Disclaimer

This fact sheet provides information on legal obligations when terminating an employee's employment. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.



For information about termination of employment, see the [Fair Work Ombudsman website](#).

The Fair Work Commission (Australia's national workplace relations tribunal) also has information on the [termination of employment](#) section of its website.



## When is termination unlawful?

An employer can't terminate an employee's employment for an unlawful reason, a discriminatory reason, or in breach of the person's employment contract, regardless of their position or income. (See 'general protections' below).

For employees who have completed the minimum employment period and:

- are covered by a modern award
- are covered by an enterprise agreement, or
- earn less than the high income threshold

termination of employment must be done in accordance with the provisions relating to the protection from unfair dismissal in the [Fair Work Act 2009 \(Cth\)](#) (**Fair Work Act**). (See 'unfair dismissal' below).



### Note

While employees should be given fair warning and support to improve their performance before a decision is made to terminate their employment, there is no legal requirement to comply with a 'three-strikes policy'.

## What is unfair dismissal?

A person has been unfairly dismissed if, on application by the dismissed employee, the Fair Work Commission finds the dismissal was:

- harsh, unjust or unreasonable
- not consistent with the [Small Business Fair Dismissal Code](#) (if applicable), and
- not a case of genuine redundancy (See 'what is a genuine redundancy?' below)

### Factors considered by the Fair Work Commission

The factors that the Fair Work Commission must consider in deciding whether the dismissal was harsh, unjust or unreasonable are broad and include:

- whether the dismissal was for a valid reason related to the person's capacity or conduct including its effect on the safety and welfare of other employees (this includes circumstances where the dismissed employee sexually harassed another person in connection with their employment)
- whether the person was notified of that reason
- whether the person was given an opportunity to respond to any reason related to their capacity or conduct
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal
- the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal
- if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal
- the degree to which the absence of dedicated human resources management specialists or expertise in the enterprise would be likely to impact on procedures followed in effecting the dismissal, and
- any other matters that the Fair Work Commission considers relevant. This may include the employee's personal circumstances

### Serious misconduct

If an employee has committed serious misconduct, there may be scope to proceed with dismissal without providing notice of termination (summary dismissal).



Serious misconduct is defined as wilful or deliberate conduct that is inconsistent with the continuation of the employment contract. It is also conduct that causes serious or imminent risk to the health and safety of a person or to the reputation, viability or profitability of the employer's business.

Serious misconduct includes:

- engaging in theft, fraud, assault, or sexual harassment
- unsafe conduct
- being intoxicated at work or
- refusing to carry out a lawful and reasonable instruction that is consistent with the employee's employment contract

These circumstances have all been found by the Fair Work Commission to constitute serious misconduct. However, each case will turn on its own facts and you should get legal advice before taking action.

### Minimum employment period

An employee can't make an unfair dismissal application if they haven't served the minimum employment period. For a [Small Business](#) (fewer than 15 employees, including casuals) the minimum employment period is one year and for an employer that is not a Small Business the minimum employment period is 6 months.



For more information, see the [Fair Work Ombudsman's webpage 'unfair dismissal'](#).



### Caution

Your organisation should get legal advice before dismissing an employee.

Laws around termination of employment are complex and there are many factors that may influence how your organisation manages any proposed employment termination. It's important to understand what laws may apply and to manage any risk in connection with these laws.



### Note

If your organisation is a small business employer (it has fewer than 15 employees, including casual employees, employed on a regular and systematic basis) and the Fair Work Commission is satisfied that it has followed the [Small Business Fair Dismissal Code](#), the Commission can't make a finding that the dismissal was unfair.

## What are general protections?

Under the *Fair Work Act*, employees are given 'general protections' which, among other things, stop an employer from taking adverse action against an employee, including dismissal of an employee:

- to prevent the exercise of a workplace right
- because the employee has a workplace right
- because the employee has or has not exercised a workplace right
- because the employee proposes to or proposes not to exercise a workplace right



- because a person is or is not, or was or was not, an officer or member of an industrial association such as a union or employer association
- because a person is engaged or not engaged, or proposed to engage or to not engage, in lawful industrial activity (such as a strike)
- for a discriminatory reason (because of an employee or prospective employee's age, race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin)
- because a person is temporarily absent from work due to illness or injury (provided certain conditions are met), or
- to engage an individual who is an employee of the employer and performs particular work for the employer as an independent contractor to perform the same or substantially the same work

A person has a **workplace right** if the person:

- has an entitlement to a benefit, or has a role or responsibility, under a workplace law, workplace instrument or order made by an industrial body (for example, the Fair Work Commission or the Federal Court of Australia)
- is able to initiate or participate in a process or proceedings under a workplace law or instrument
- is able to make a complaint or inquiry to a person or body with capacity to seek compliance with a workplace law or instrument, or
- if the person is an employee, is able to make a complaint or inquiry in relation to their employment



## Examples

Examples of exercising a workplace right include when an employee:

- makes a complaint or inquiry in relation to their employment
- takes leave or other rights in accordance with the National Employment Standards or an applicable industrial instrument
- is temporarily absent from work due to illness or injury, or
- makes a request for flexible working arrangements



For more information, see the [Fair Work Commission's webpage 'Dismissal under general protections'](#).



## Caution

Be careful about terminating an employee's employment if they have made a recent complaint. An employer can be ordered to pay uncapped compensation for a breach of the general protections provisions.

## What is a genuine redundancy?

A redundancy occurs when an employer no longer requires a particular job to be performed by anyone because of changes in the organisation's operational requirements.



Unfair dismissal laws focus on whether a redundancy is genuine. A redundancy will not be an unfair dismissal if it is genuine.

A genuine redundancy occurs where:

- the organisation no longer needs the job to be performed by anyone because of changes in operational requirements, and
- the organisation follows the consultation requirements in an applicable award, enterprise agreement or other industrial instrument that applies

A redundancy is not genuine if it would have been reasonable in all the circumstances for the employee to be redeployed within the organisation or an associated entity. Your organisation may also need to consider whether an employee is entitled to redundancy pay.



For more information, see the [Fair Work Ombudsman's webpage 'Redundancy'](#).



### Caution

This is a complex area of employment law. If your organisation is considering making an employee's role redundant you should seek legal advice to protect your organisation from risk.

## What are your notice obligations?

The Fair Work Act sets minimum periods of notice for termination of employment. These notice periods increase with an employee's length of continuous service. Generally, you must not terminate an employee's employment unless you have given the employee written notice of the day of termination. If you don't want your employee to serve the applicable period of notice, you may pay them in lieu of part or all of that notice period.

An employee may be entitled to a longer period of notice if this is provided for in an applicable modern award, enterprise agreement or contract of employment.

There are some exceptions to the obligation to provide written notice, such as in relation to casual employees, fixed term employees, certain trainees, and employees whose employment is terminated for serious misconduct. However, these exceptions are also subject to the terms of any relevant modern award, enterprise agreement or employment contract. If your organisation is considering terminating an employee's employment without providing written notice, you should seek legal advice.



### Caution

Serious misconduct can provide a basis to dismiss an employee without providing any notice to the employee. The employee should always be given an opportunity to respond before termination of employment.

You'll need to check whether summary dismissal affects the employee's final payments. In addition to the employee not having an entitlement to notice of termination or payment in lieu, in some Australian jurisdictions an employee may not be entitled to be paid out their accrued long service leave if they have been summarily dismissed.



## How does your organisation calculate final payments?

To calculate the final payments that you owe a terminated employee – check the award, enterprise agreement or employment contract that applies and call the Fair Work Ombudsman for confirmation.

At a minimum, employers must pay the employee whose employment has been terminated:

- accrued but unused annual leave (which may include leave loading)
- 'payment in lieu' if the employee is not going to work through the normal notice period until their last day of employment
- payment for time worked at the full rate of pay, including relevant superannuation contributions, loadings, monetary allowances, overtime or penalty rates, and
- pro-rata long service leave, if applicable under relevant long service leave legislation or the modern award or enterprise agreement covering the employee

Special tax rules apply to some termination payments so it's important to get advice from your accountant to make sure you comply with tax laws.



For more information about notice and final pay, see the [Fair Work Ombudsman's webpage 'ending employment'](#).



### Caution

Check with the Fair Work Ombudsman and the Australian Taxation Office or your accountant to make sure you are correct.

## What happens if an employee objects to the termination?

There are a number of different avenues through which an employee may pursue a claim in connection with the termination of their employment.

As many claims relating to dismissal are subject to strict time limits and exceptions, it's important to get legal advice if you receive a claim.

## Visa holders

If the employee holds a visa to work in Australia, you may have an obligation to tell the Department of Home Affairs that the employee's employment has ended.



### More information

For more information, see the [Department of Home Affairs webpage 'Change of situation'](#).



## Exit procedures

Consider developing a standard exit procedure that includes the following steps:

- make a time with the employee to complete a handover of duties
- confirm the employee's contact details
- fill the vacancy so the present employee can help train their replacement
- remind the employee of any contractual obligations that continue after their employment ends, such as the need to comply with post-employment restraints and obligations around using confidential information and intellectual property
- make sure the employee returns security passes and other property of the organisation, and
- cancel computer codes and passwords after the employee leaves

If appropriate in the specific circumstances, you may also wish to organise an exit interview with the employee to gather feedback on their experience with your organisation and improvement areas.

You are not obliged to provide a reference or a statement of employment for an employee who is leaving but if you do, make sure everything you say is accurate.